

*United States Court of Appeals
for the Second Circuit*



APPENDIX

76-1158

To be argued by
JONATHAN J. SILBERMANN

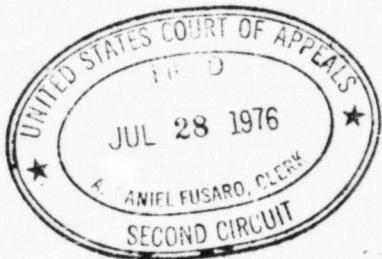
UNITED STATES C^o RT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
-against- :
ARONA FARY DIOP, :
Defendant-Appellant. :
-----x

B *PLS*
Docket No. 76-1158

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ARONA FARY DIOP
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

* Show last names and suffix numbers of other defendants on same indictment/information

DATE		PROCEEDINGS	V. Excludable Delay		
			(a)	(b)	(c)
11/8/75		AUSA - WEINBACH. D.C. will get own.			
11/18/75		Indictment filed. See 75 CR 873.			
11-18-75		Before COSTANTINO J - Indictment filed.			
12-2-75		Before DOOLING J - case called - deft not present -defts atty J. Panzer moves for a reduction of bail - motion denied pleading adjd to Dec. 3, 1975 - trial scheduled for 12-22-75 to follow defts counsels engagement in 75 CR 272.			
12-2-75		Notice of Appearance filed.			
12-3-75		Before DOOLING J - case called - deft & counsel Joseph Panzer present - N'Diaye sworn as interpreter - deft arraigned and enters a plea of not guilty - deft renewes motion for a reduction of bail -motion denied.			
12/16/75		<u>SUPERSEDING INDICTMENT FILED</u> (Before JUDD,J.)			
12/22/75		Before DOOLING,J. - Case called- Deft and counsel J. Peazer and A. Wallach present-G. N'Diaye interpreter present- Deft arraigned (75CR873) and enters a plea of not guilty - Margarita Mensa sworn as a interpreter-Govt rests -Hearing adjd awaiting arrival ofgovt witness-Giory selction portion of trial ordered and begun-Deft moves for the declaration of a mistrial-Motion denied-Motion to Suppress adjd to 12/23/75 Jury selection adjd to 12/23/75			

DATE	V. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
12/23/75	Before DOOLING, J. - Case called- deft and counsel present-suppression hearing resumed-interpreter sworn-hearing concluded-motion to suppress granted except for portion of questioning of deft by Charles Grabbatin-trial ordered and begun as to superseding indictment-jurors selected and sworn-trial contd to 12/24/75				
12/24/75	Stipulation of accepting verdict of less than 12 jurors, etc. filed				
12/24/75	Before DOOLING, J. - Case called- deft and counsel present-govt rests-deft's motion for judgment of acquittal- motion denied-trial contd to 12/26/75				
2/26/75	Before DOOLING, J. - Case called- deft and counsel present-trial resumed-interpreter present-deft rests-both sides rest-deft moves for judgment of acquittal-motion denied- trial contd to 12/29/75				
12/29/75	Before DOOLING, J. - Case called- Deft and counsel J. Panzer present-G. Diaye present as interpreter-Trial resumed-Govt's summation-Deft's summation -Govt's rebuttal summation-Jury charged-Marshall's sworn-Jury retires to deliberate-The jury returns with a verdict of guilty as to all counts(Counts 1-4)- Jury discharged-Trial concluded-Deft moves to set aside the verdict and renews his motion for judgment of acquittal not with standing the verdict-Motion denied.				
29/75	By DOOLING, J. - Order of Sustenance dated 12/29/75 filed.				
12/30/75	Stenographers Transcript dated 12/22/75 filed				
2-20-76	Before DOOLING J - case called - deft & counsel J. Panzer present - Mr. Diaye sworn as interpreter - adjd to March 26, 1976 at the request of counsel for the deft.				
3-2-76	Notice of Motion filed pursuant to Rule 33 for a new trial, etc.				
3/3/76	Memorandum from Judge Dooling setting motion for new trial for 3/10/76 at 9:30 A.M. filed				
3-10-76	Before DOOLING J - case called - deft & counsel J. Panzer present - Gargui N. Diaye sworn as interpreter - hearing on motion for a new trial ordered and begun - hearing contd to March 12, 1976 at 2:00 P.M.				
3-10-76	Notice of Motion filed for a new trial on the ground of newly discovered evidence, etc.				
3-19-76	Before DOOLING J - case called - deft & atty J. Panzer present - Jack M. Trabout sworn as interpreter - hearing resumed - hearing concluded - decision reserved.				
3/23/76	By DOOLING, J.- Memorandum and Order filed denying motion to set aside verdict and for a new trial				
3-23-76	4 stenographers transcripts filed (pgs 1 to 352)				
3-26-76	Before DOOLING J - case called - deft & atty J. Panzer present. Jack Trabout sworn as interpreter - deft is sentenced to imprisonment for 3 years and in addition special parole term of 3 years on each count, to run concurrently. On motion of AUSA Teitler the indictment is dismissed. Deft advised of right to appeal. Clerk directed to file a Notice of Appeal forthwith without payment on behalf of the deft.				

CRIMINAL DOCKET

P. G. 109

RJD:SHD:sd
F. #753703

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOV 18 1975

----- X TIME A.M.
UNITED STATES OF AMERICA P.M.

Cr. No.

(T. 21, U.S.C., §952(a),
§960(a)(1) and §841(a)(1))

ARONA DIOP,

- against -

Defendant.

----- X
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 6th day of November 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant ARONA DIOP, did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §952(a) and §960(a)(1)).

COUNT TWO

On or about the 6th day of November 1975, within the Eastern District of New York, the defendant ARONA DIOP did knowingly and intentionally possess with intent to distribute approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §341(a)(1)).

A TRUE BILL.

John J. Egan Jr.

FOREMAN

David G. Trager

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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RJD: SAT: eh
F. #753,703

75 CR 873

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X -----

UNITED STATES OF AMERICA

- against - U.S. DISTRICT COURT, NY
ARONA DIOP, DEC 16 1975
Defendant.

TIME A.M.
P.M. X ...

SUPERSEDING INDICTMENT

Cr. No. 75 CR 873(s)
(T. 21, U.S.C. §952(a)
§960(a)(1) and
841(a)(1))

THE GRAND JURY CHARGES:

COUNT ONE:

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant, ARONA DIOP, did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §952(a) and §960(a)(1)).

COUNT TWO

On or about the 6th day of November, 1975, within the Eastern District of New York, the defendant, ARONA DIOP, did knowingly and intentionally possess with intent to distribute approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1)).

COUNT THREE

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the

defendant, ARONA DIOP, did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately thirty-two (32) kilograms of marijuana, in the form of hashish, a Schedule I controlled substance. (Title 21, United States Code, §952(a) and §960(a)(1)).

COUNT FOUR

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant, ARONA DIOP, did knowingly and intentionally possess with intent to distribute approximately thirty-two (32) kilograms of marijuana, in the form of hashish, a Schedule I controlled substance. (Title 21, United States Code, §841(a)(1)).

A TRUE BILL

William P. Esposito

FOREMAN

David G. Trager

DAVID G. TRAGER
United States Attorney
Eastern District of New York

2 THE COURT: Members of the jury, you have heard
3 the evidence in the case and the arguments of counsel
4 and now must receive the instructions on the law that
5 governs the case.

6 You, the jurors, are the sole judges of the
7 facts. You must, however, follow the law as given to
8 you in these instructions and apply it to the facts
9 as you find them from the evidence before you. You
10 are not free, nor am I, to substitute our private
11 judgments as to what the law should be for what the
12 law in fact is.

13 You have been sworn as jurors well and truly
14 to try this case and to render a true verdict. You
15 must therefore exclude from your deliberations all
16 bias and prejudice. You must not permit yourselves to
17 be governed by sympathy or any other considerations
18 not founded in the evidence and these instructions on
19 the law.

20 The issues of fact to be tried are those made
21 by the indictment and the defendant's pleas of "Not
22 guilty." Bear in mind that the indictment is the formal
23 method of accusing a person of a crime; it is not
24 itself evidence that a defendant committed the crime
25 charged, nor is the fact that the indictment was found

2 any evidence of guilt.

3 The charges of the indictment have been found
4 under two different sections of Title 21, United States
5 Code, dealing with what are called "controlled sub-
6 stances." Under the provisions of Section 812(c),
7 marijuana, in the form of hashish, is a controlled
8 substance. Under the provisions of Section 812(c),
9 Schedule 2(a)(1), opium is a controlled substance, and
10 under the provisions of Section 802(16)(a), is a
11 narcotic drug-controlled substance.

12 Counts One and Three of the indictment are
13 drawn under Sections 952(a) and 960(a)(1) of Title 21,
14 which so far as we are concerned with them, provides
15 that, "It shall be unlawful to import into the United
16 States from anyplace outside thereof, any controlled
17 substance."

18 Count One, charging importation of opium, reads
19 as follows:

20 On or about the sixth day of November, 1975,
21 within the Eastern District of New York, at John F.
22 Kennedy International Airport, Jamaica, Queens,
23 New York, the defendant Arona Diop did knowingly and
24 intentionally import into the United States from
25 Abidjan, Ivory Coast, approximately 950 grams of opium,

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Charge of the Court

2 a Schedule 2 narcotic drug-controlled substance.

3 The essential elements of Count One of the
4 indictment, all of which the Government must prove
5 beyond a reasonable doubt, or else you must acquit
6 the defendant on Count One, are the following.7 First, that the defendant caused to be brought
8 or brought a quantity of opium into Kennedy Airport
9 from abroad;10 And, second, that the defendant knew that the
11 substance being brought into the United States was
12 opium or some other narcotic drug;13 And, third, that the defendant understood that
14 he was acting illegally.15 If the Government proves each one of these three
16 essential elements beyond a reasonable doubt, then you
17 must find the defendant guilty on Count One. If the
18 Government fails to prove any one or more of the
19 three essential elements of Count One beyond a reasonable
20 able, then you must acquit the defendant on Co - t One.21 Count Three, charging importation of marijuana,
22 reads as follows:23 On or about the 6th day of November, 1975,
24 within the Eastern District of New York, at John F.
25 Kennedy International Airport, Jamaica, Queens, New York,

2 the defendant, Arona Diop, did knowingly and inten-
3 tionally import into the United States from Abidjan,
4 Ivory Coast, approximately 32 kilograms of marijuana,
5 in the form of hashish, a Schedule 1 controlled
6 substance.

7 The essential elements of Count Three are
8 similar to those of Count One. The Government must
9 prove beyond a reasonable doubt all of the following:

10 First, that the defendant caused to be brought
11 or brought a quantity of marijuana, in the form of
12 hashish, into Kennedy Airport from abroad; and, second,
13 that the defendant knew that the substance being
14 brought into the United States was marijuana in the
15 form of hashish or some other illicit drug; and,

16 Third, that the defendant understood that he
17 was acting illegally.

18 If the Government proves each one of these three
19 essential elements beyond a reasonable doubt, then
20 you must find the defendant guilty on Count Three.

21 If the Government fails to prove any one or more of
22 the three essential elements of Count Three beyond
23 a reasonable doubt, then you must acquit the defendant
24 on Count Three.

25 Counts Two and Four of the indictment are drawn

2 under Section 841(a)(1) of Title 21, which so far as
3 we are concerned with it, provides that, "It shall be
4 unlawful for any person knowingly or intentionally to
5 distribute or possess with intent to distribute a
6 controlled substance."

7 Count Two charging possession of opium with
8 intent to distribute it, reads as follows:

9 On or about the 6th day of November, 1975,
10 within the Eastern District of New York, the defendant
11 Arona Diop, did knowingly and intentionally possess with
12 intent to distribute approximately 950 grams of opium,
13 a Schedule 2 narcotic drug-controlled substance.

14 The essential elements of Count Two, all of
15 which the Government must prove beyond a reasonable
16 doubt or else you must acquit the defendant on Count
17 Two, are the following:

18 First, that the defendant did possess a quan-
19 tity of opium and;

20 Second, that the defendant understood at the
21 time when he had it in his possession, that the
22 substance of which he had possession was opium or some
23 other narcotic drug and;

24 Third, that the defendant intended to deliver
25 the substance to another person.

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Charge of the Court

2 If the Government proves all the essential
3 elements of Count Two beyond a reasonable doubt, you
4 will convict the defendant on Count Two. If the
5 Government fails to prove any one or more of the
6 essential elements of Count Two beyond a reasonable
7 doubt, you must acquit the defendant on Count Two.

8 Count Four, charging possession of marijuana
9 in the form of hashish, with intent to distribute
10 it, reads as follows:

11 On or about the 6th day of November, 1975,
12 within the Eastern District of New York, at John F.
13 Kennedy International Airport, Jamaica, Queens, New York,
14 the defendant, Arona Diop, did knowingly and intentionally
15 possess with intent to distribute approximately 32
16 kilograms of marijuana, in the form of hashish, a
17 Schedule controlled substance.

18 The essential elements of Count Four are similar
19 to those of Count Two. The Government must prove
20 beyond a reasonable doubt all of the following:

21 First, that the defendant did possess a quantity
22 of marijuana, in the form of hashish, and;

23 Second, that the defendant understood at the
24 time when he had it in his possession, that the sub-
25 stance of which he had possession was marijuana. in the

2 form of hashish, or some other illicit drug, and;

3 Third, that the defendant intended to deliver
4 the substance to another person.

5 If the Government proves all the essential
6 elements of Count Four beyond a reasonable doubt,
7 you will convict the defendant on Count Four. If the
8 Government fails to prove any one or more of the
9 essential elements of Count Four beyond a reasonable
10 doubt, you must acquit the defendant on Count Four.

11 Each Count of the indictment must be considered
12 separately on the basis of the evidence relating to
13 it, and your verdicts need not be the same for all
14 counts.

15 "Distribute," as used in the statute and in
16 the counts of the indictment means simply to deliver
17 a controlled substance.

18 Counts One and Two of the indictment deal with
19 opium. As I said to you earlier, under the law,
20 opium is a Schedule 2 controlled substance and a
21 narcotic drug. You will recall in Counts One and Two
22 that it is an essential element of the indictments
23 that the defendant knew that the substance in question
24 was opium, or that he thought the substance was some
25 other Schedule 2 or narcotic drug.

However, Counts Three and Four of the indictment deal with marijuana in the form of hashish.

Marijuana or hashish is a Schedule 1 controlled substance. Thus, in Counts Three and Four, it is an essential element of the indictment that the defendant knew that the substance in question was marijuana in the form of hashish, or that he thought that the substance was some other Schedule 1 illicit drug.

10 Thus, for Counts One and Two, while the
11 Government must show that the defendant knew that the
12 substance he was dealing with was opium or some other
13 narcotic drug, that does not mean that he had to know
14 or call it by its exact chemical composition and
15 the correct chemical name of the drug. It is essen-
16 tial that the Government show beyond a reasonable
17 doubt that he understood that the substance was a
18 narcotic drug, whatever the common code or local name
19 given to it; that is, the Government must show that
20 he understood that he was participating in the illegal
21 narcotic drug traffic.

22 And, for Counts Three and Four, while the Govern-
23 ment must show that the defendant knew that the sub-
24 stance he was dealing with was marijuana in the form
25 of hashish or some other illicit drug, that does not

2 mean that he had to know or call it by its exact
3 chemical composition and the correct chemical name
4 of the drug. It is essential that the Government
5 show beyond a reasonable doubt that he understood
6 that the substance was an illegal drug, whatever the
7 common code or local name given to it; that is, the
8 Government must show that he understood that he was
9 participating in the illegal drug traffic.

10 The Government does not have to prove that
11 knowledge by direct evidence, such as a statement
12 coming from the defendant's own lips which those who
13 heard him speak are able to testify to before you,
14 or other such direct evidence. But it is necessary
15 for the Government to prove facts and circumstances
16 from which you are able to and do infer beyond a
17 reasonable doubt that the defendant did know the
18 nature of the substance he was dealing with.

19 Similarly, since the charges made here are
20 charges of criminal misconduct, it must be shown that
21 defendant acted with a guilty mind. Hence, in each
22 count you are required to find that the defendant
23 understood that what he was doing was illegal. That
24 does not mean that he must know the precise United
25 States statute involved, or indeed that any specific

2 statute of the United States was involved or precisely
3 what the law was.

4 What is required is that you be satisfied
5 from the evidence beyond a reasonable doubt that
6 the defendant was conscious, that in doing what he was
7 doing he was embarked on a course of conduct that
8 violated the law, and that he nevertheless engaged in
9 the activity.

10 Bear in mind that the charge of Counts One and
11 Three is importation and the charge of Counts Two and
12 Four is possession with intent to distribute. The
13 Government does not charge and does not have to prove
14 that the defendant owned the illicit drugs, nor need
15 it prove who did own the drugs; but it must prove
16 under Counts One and Three that defendant brought the
17 drugs into this country, that he knew that what he
18 had brought in was an illicit drug, and that he knew
19 his actions were illegal; and it must prove under
20 Counts Two and Four that the defendant, whether he
21 owned the drug or not, did have the drugs in his
22 possession, that he knew when he had it in his hands
23 what drugs it was and that he then intended to deliver
24 it to someone else.

25 I should add that the Government need not

2 establish that the quantity of opium was 950 grams,
3 or about 35 ounces, as charged in Counts One and Two,
4 nor must it establish that the quantity of marijuana,
5 in the form of hashish, was 32 kilograms, as charged
6 in Counts Three and Four. It must, however, prove
7 beyond a reasonable doubt that the quantity was about
8 that quantity as adjudged by seeing it.

9 The evidence is that the controlled substances,
10 the opium, hashish and marijuana, were enclosed in a
11 bottom section of the crate, Exhibit 8, that they were
12 not recited in the air waybill, that their combined
13 weight was about 60 kilograms, that the weight recited
14 in the air waybill issued by Air Afrique in Abidjan
15 was 150 kilograms, and the re-weighing at Kennedy
16 Airport resulted in freight charges being assessed on
17 the basis of 270 kilograms, and that defendant had
18 the air waybill in his possession at Kennedy Airport
19 on November 7, 1975, and presented it with the other
20 documents to Inspector Grabbatin.

21 The air waybill of which Exhibits A and B are
22 counterpart copies is what is called a negotiable
23 bill, and under the law the air carrier is not allowed
24 to surrender the goods described in it to anyone
25 except the person who holds the original air waybill.

Charge of the Court

2 That gives the holder of the bill control over the
3 shipment, and, in this case, that means control over
4 the crate, Exhibit 8, and its contents. From that
5 it follows that if you conclude that Mr. Diop knew
6 all along that the controlled substances were in the
7 bottom section of the crate, he was in conscious
8 control of them, and would, as a matter of law, be
9 the importer of the controlled substances.

10 He would also, as a matter of law, be in what
11 the law calls constructive possession of the controlled
12 substances, since his holding of the air waybill gave
13 him the power to take delivery of the crate or direct
14 the place to which and the person to whom it was to
15 be delivered. But, again, the big thing that you must
16 decide is whether or not you are satisfied beyond a
17 reasonable doubt that Mr. Diop knew when he went to
18 pick up the crate at Kennedy Airport that the controlled
19 substances were in the crate, Exhibit 8.

20 I have said that the Government must prove the
21 essential elements of the crimes charged beyond a
22 reasonable doubt.

23 Proof beyond a reasonable doubt is not proof
24 to an absolute certainty. Few things in life can be
25 so proved. Proof beyond a reasonable doubt is such

2 proof as you would be willing to rely and act upon
3 in the most important of your own affairs.

4 If, after carefully weighing all the evidence
5 you have an abiding conviction of the truth of the
6 charge such that you feel conscientiously bound to
7 act upon it, then you would be free from reasonable
8 doubt. If, however, after weighing all the evidence,
9 you have such a doubt as would cause prudent persons
10 to hesitate before acting in matters of importance to
11 themselves, such a doubt would be a reasonable doubt.

12 That does not mean that each bit of the Govern-
13 ment's evidence must be found by you to be true beyond
14 a reasonable doubt, it means rather that in sum total
15 the Government's evidence must satisfy you beyond a
16 reasonable doubt as to each element of the crime charged,
17 or you must acquit.

18 A reasonable doubt may arise not only from
19 the evidence produced, but also from the lack of
20 evidence. Since the burden of proof is always on the
21 Government, a defendant has the right to rely on the
22 failure of the Government to prove any essential
23 element of the charge. A defendant may rely, too,
24 on evidence brought out on his cross-examination of
25 witnesses called by the Government. The law does not

2 impose on a defendant the burden or duty of producing
3 any evidence.

4 A defendant is presumed to be innocent and that
5 presumption accompanies him throughout the trial. It
6 continues unless you are satisfied on all the evidence
7 that the Government has proved defendant's guilt beyond
8 a reasonable doubt.

9 I will not summarize the evidence. You have
10 heard nine witnesses, to name them in the order in
11 which they testified:

12 Gerard Brady, Charles Grabbatin, John Huber,
13 Robert Janice, Joseph Giaimo, Matias Rodriguez, Tony
14 Archer, Steve Glantz and Arona Diop. 26 exhibits have
15 been received in Evidence.

16 I have said you must decide the case on the
17 evidence. The evidence is the testimony of these
18 witnesses and the exhibits received in evidence.

19 Statements and arguments of counsel and answers
20 stricken from the record are not evidence.

21 The evidence includes, of course, what is brought
22 out on cross-examination as well as what is testified
23 under direct examination.

24 Your verdict must be based on the evidence. But
25 in your consideration of the evidence you are not limited

2 to the bare words of the witnesses and the bald facts
3 that you find have been proved. The evidence includes
4 the inferences reasonably to be drawn from the testimony
5 which you hear and the facts which you find have been
6 prov d.

7 There are two types of evidence from which you
8 may lawfully find that a fact has been proven. One
9 is direct evidence, such as the testimony of an eye-
10 witness to his observations of the facts to be proved;
11 the other is circumstantial evidence, the proof of
12 facts and circumstances which rationally imply the
13 existence or non-existence of some other fact because
14 such other fact usually and reasonably follows according
15 to the common experience of mankind.

16 Thus, if you see people coming into a building
17 shaking out dripping umbrellas and others about to go
18 out of doors, turning back toward their offices, you
19 infer from these circumstances that it is raining
20 outside. Or, while you can see from your window that
21 the sky is full of clouds and the streets are wet,
22 you see also that passing cars are not using their
23 windshield wipers and passersby are carrying their
24 umbrellas folded under their arms, you infer from those
25 circumstances that it is not raining.

Charge of the Court

2 As a general rule, the law makes no distinc-
3 tion between direct and circumstantial evidence. If
4 the evidence, as here, is in part indirect and cir-
5 cumstantial, then you apply to it, along with all the
6 other evidence, the same standard of proof, it must,
7 taken with the other evidence, satisfy you of the
8 defendant's guilt, beyond a reasonable doubt, or else
9 you must acquit.

10 You are the sole judges of the credibility of
11 the witnesses. The motives and state of mind of each
12 witness as they appear to you and the circumstances
13 and inducements under which the witness testified are
14 to be taken into account.

15 Consider the relationship each witness may bear
16 to either side of the case and the manner in which the
17 verdict might affect him.

18 The testimony of the defendant is competent
19 and is to be judged by you by the same standards of
20 any other witness including inevitably the effect of
21 his interest in the outcome of the case.

22 You may consider the appearance and manner of
23 each witness on the witness stand, the witness'
24 apparent candor or lack of it, and the character of the
25 testimony given, whether the testimony contains

2 inconsistencies or discrepancies, whether it is
3 intrinsically credible or seems to you in whole or
4 in part improbable, and whether it conflicts with other
5 testimony or is consistent with other testimony in
6 the case.

7 In determining the credibility of witnesses
8 and their testimony, the testimony of Government
9 employees is not entitled to any greater weight
10 simply because they are Government employees. You
11 evaluate their testimony just as you would that of
12 any other witness.

13 In weighing the effect of conflict or discrepancy,
14 consider whether it pertains to a matter of importance
15 or to unimportant details and whether it seems to you
16 to result from innocent error or from falsehood. If
17 you find a witness has been mistaken or untruthful,
18 in all or in part of the testimony given, then you may
19 give the testimony of that witness such credit,
20 any, as you think it deserves in the light of the
21 nature and extent of the defects that you find in it.

22 The Government has presented testimony concerning
23 statements allegedly made by defendant at Kennedy
24 Airport on November 7th and it has argued that what
25 he there said contradicts or is inconsistent with
his testimony here in court. You must determine

2 whether you are satisfied that the defendant did make
3 such statements, whether they are inconsistent with
4 or contradictory of his testimony here.

5 If you do find inconsistency or contradiction,
6 you may consider that only in determining the defen-
7 dant's credibility as a witness. from the
8 question of his credibility as a witness, you may not
9 treat what you find Mr. Diop said at Kennedy Airport
10 as evidence of what the facts are. You may treat it
11 only as nullifying those parts of defendant's testimony
12 here which are inconsistent or contradicted by what
13 you find he said at Kennedy Airport.

14 If you conclude that a witness has knowingly
15 testified falsely concerning any material matter, you
16 have a right to discuss that witness' testimony in
17 other particulars. You may reject all the witness'
18 testimony or give it or parts of it the credence you
19 think it deserves.

20 I have sought not to comment on the evidence or
21 to give any impression as to my own view, if I have
22 one, of the relative weight of the evidence. If I have
23 done so, however, you may disregard it entirely, for
24 you are the sole judges of the facts.

25 From time to time in the course of the trial

2 objections have been made and rulings on evidence
3 given. Draw no inference from the comparative frequency
4 of objection of one or the other side or from the
5 comparative record in having objections sustained.

6 When an objection to a question has been sus-
7 tained, disregard the question and draw no inferences
8 from its wording about the answer that might have been
9 given.

10 Where an objection is overruled, evidence then
11 received has no special weight just because unsucces-
12 fully objected to.

13 Your verdict must be unanimous. It is your duty
14 as jurors to consult with one another and to deliberate
15 with a view to reaching agreement, if you can do so
16 without doing violence to individual judgment. Each
17 of you must decide the case for yourself but do so
18 only after an impartial consideration of the evidence
19 with your fellow jurors.

20 In the course of your deliberations, do not
21 hesitate to re-examine your own views and change your
22 opinion if convinced it is erroneous. Your task is
23 one of conscience, and pride of opinion has no place
24 in matters of conscience. But do not surrender your
25 honest conviction as to the weight or effect of evidence

Charge of the Court

2 solely because of the opinion of your fellow jurors
3 or for the mere purpose of returning a verdict.

4 The form of your verdict, which must be given
5 separately on each count, is simple. Your verdict
6 must be either guilty or not guilty, it must be given
7 separately for each count, and it must be a unanimous
8 verdict on each count. Your verdict need not be the
9 same on both counts.

10 (Continued on next page.)

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2 THE COURT: (continuing) Your verdict on each
3 count will be delivered orally here in open court by
4 your Forelady in response to questions which the Dep-
5 uty Clerk of the Court will address to her.

6 You are not partisans. You are judges, judges of
7 the facts. Your sole interest is to ascertain the truth
8 from the evidence in the case.

9 When you have reached a verdict and are ready to
10 report, simply advise the Marshall that you have reached
11 a verdict without disclosing orally or in writing what
12 your verdict is.

13 Your verdict must not be disclosed to anyone
14 before you deliver it orally in the courtroom in response
15 to the questions of the Clerk of the Court.

16 If you wish to communicate with the Court, do so
17 in writing, using the Forelady, Juror number one as your
18 intermediary and representative. Notify the Marshall when
19 you have any such communication.

20 There will now be a short recess during which
21 Counsel will review the charges with me to make certain
22 that nothing has been omitted or misspoken. Then you
23 will retire to the jury room to deliberate your verdict.

24 (Whereupon jurors were excused from the courtroom)

25 THE COURT: Any further requests or exceptions?

1 MR. PANZER: I have no requests or exceptions.

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3 MR. TEITLER: The Government only would like to
4 make comment to that portion of the charge which dealt
5 with the Harris against New York Rule. Apparently, the
6 charge I believe would be one to understand that
7 everything the Defendant said at the time he was at
8 JFK Airport can be used solely to impeach the credibil-
9 ity of the witness and for no other purpose.

10 THE COURT: You have had that charge for some
11 time, I gave it to you in exact form in which I read it
12 some day or two ago.

13 MR. TEITLER: Somehow your Honor, when it's read,
14 when I heard it it sounded different to me from the way
15 it was when I read it, and I apologize for that.

16 THE COURT: What do you suggest?

17 MR. TEITLER: The only material statement the
18 Defendant made was that he acknowledged that he owned
19 the crate.

20 THE COURT: He said, "This is my--" He was asked
21 "Is this your crate?"

22 MR. TEITLER: That's the only thing that con-
23 cerns me, and I believe it's the only material one the
24 Defendant made.

25 MR. PANZER: I will object to any correction of
the charge, your Honor.

1 THE COURT: 203(a)

2 MR. TEITLER: I would submit that this might be
3 cured in the following manner, where the Court stated
4 you must not treat what Mr. Diop said at Kennedy Airport
5 --other than the statement that the crate was his. With
6 respect to that statement, you may consider whether or
7 not that statement proves the fact that the crate was
8 Mr. Diop's.

9 MR. PANZER: I'll object to that, your Honor.

10 THE COURT: He has denied making that statement;
11 direct contradiction on that.

12 MR. PANZER: I will object to the U.S. Attorney's
13 correction. I think the charge is eminently fair as
14 given.

15 THE COURT: I think line three--all you are
16 entitled to are the words after the crate and its bottom
17 compartment had been opened--

18 MR. PANZER: I will object to any correction.

19 THE COURT: Just a second, if you will. Yes, Mr.
20 Manzer.

21 MR. PANZER: I said, your Honor, I would object
22 to any correction. I feel that the charge as given is
23 adequate, and I will object to the statement made by
24 the U.S. Attorney that the Defendant didn't prove an-
25 thing. I believe the Court did tell the jury at the

1 time that the Defendant does not have to prove anything.

2 THE COURT: And I reiterated it in the formal
3 charge, but this is simply just a question of what
4 statements are reduced in evidentiary value below the
5 quality of the admission, and it's only those which were
6 suppressed, that is those statements that were made
7 after the crate had been opened and the contents of the
8 lower part of it exposed. I think Government Counsel is
9 entitled to that. He should have brought it to my attention.
10 I'll reread that page with the charge. You are
11 allowed your exception.

12 MR. PANZER: Your Honor, thank you.

13 (Whereupon jurors returned to the courtroom, are
14 now seated in the jury box)

15 THE COURT: Counsel has drawn to my attention one
16 part of the charge which requires a little complication
17 and it's that part dealing with certain statements that
18 the Agent testified to when they were recalled as wit-
19 nesses.

20 "The Government has presented testimony concern-
21 ing statements allegedly made by Defendant at Kennedy
22 Airport on November 7th after the crate and its bottom
23 compartment had been opened, and it has argued that
24 what he there said contradicts or is inconsistent with
25 his testimony here in court. You must determine whe-

1 ther you are satisfied that the Defendant did make such
2 statements and whether they are inconsistant with or
3 contradictory of his testimony here. If you do find
4 inconsistency or contradiction, you may consider that
5 only in determining the Defendant's credibility as a
6 witness. Apart from the question of his credibility as a
7 witness, you may not treat what you find Mr. Diop said
8 at Kennedy Airport after the crate and its bottom com-
9 partment had been opened as evidence of what the facts
10 are. You may treat it only as nullifying those parts of
11 the Defendant's testimony here which are inconsistant
12 with or contradicted by what you find he said at Kennedy
13 Airport."

14 MR. PANZER: If they find that he said so.

15 THE COURT: That's emphasized in the charge.

16 If you don't believe he ever said those things
17 you don't have this problem, if you do you do.

18 MR. PANZER: Thank you.

19 THE COURT: The Marshalls will now be sworn to
20 take you into custody and keep you in custody until you
21 reach a verdict. I'm sure it's the first time that any
22 of you have ever been in custody.

23 (Whereupon two Marshalls were sworn in by the
24 Clark of the Court)

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1 December 14, 1974, that the case -- the name escapes
2 me -- where in the instance of a written acknowledgment,
3 if a defendant fails to sign a document that fact goes
4 to the weight of the evidence rather than its
5 disability. In this particular instance there was no
6 written waiver presented to the defendant, and therefore
7 I think it could fairly be stated that that case, and
8 the case line just established by learned defense
9 counsel is really irrelevant.

10 THE COURT: All right, very well.

24 He didn't ask for an interpreter; he didn't
25 give any indication that in the commercial dealings

1 he had any problems of trying to get what he wanted
2 accomplished. There isn't any contention that Mr. Diop
3 is completely ignorant to English. The evidence is so
4 overwhelmingly against it that it could not be found
5 that he is without English. He has some knowledge of
6 English in both speaking and understanding.

7 The contention is rather to put it in summary
8 terms that he was not sufficiently versed in English
9 to deal with the occasion of being asked to waive his
10 right, to stand silent. Now, there is here a very
11 strange kind of situation. I hold and find that the
12 agents who dealt with him, Mr. Grabattin, Mr. Giaiamo,
13 Mr. Cupa were not alerted to the idea that the man's
14 English was inadequate to the occasion.

15 To a certain extent his unprotesting use of
16 English at the airport led them to deal with him in
17 English and they did; all three of them. I suppose
18 there are a great many people in and around the airport
19 who speak French. I would be unsurprised if there
20 wasn't in the Pan Am hangar people who did not speak
21 French. I would wonder if there were any who spoke the
22 African dialect which was also native to Mr. Diop's
23 upbringing, but there is nothing to indicate that at any
24 time Mr. Diop indicated the preference to use French,
25 even when he got to the more difficult and troublesome

1 ground of dealing with a legal issue, the importance
2 of which one would guess he might have known from his
3 time spent in this country; and if I may say so, his
4 own passport with a showing of extensive travel, not
5 simply between this country and Africa but Paris, India,
6 with an indication that his visa to enter India was
7 obtained in the United States and that some American
8 consulate or other office -- if I am reading the
9 passport correctly, we don't have a great deal of
10 collateral situations -- that the man is as he put it
11 himself once, not a stupid man, and as one would be
12 compelled to add, he is a man who has been around.

13 He was first here in 1972 and '73, and here
14 apparently as long as eight months in one stretch.
15 He chauffeured for the Embassy, and I would venture to
16 guess, in addition to French and the native African
17 language, there must certainly have been considerable
18 English in and around the embassy, so it's -- that
19 the man felt quite equal dealing with the financial
20 transaction in English. And it is unsurprising that
21 he did so in such a way as to trap the Government men,
22 although that was not his purpose, assuming that
23 they could safely deal with him on the larger and more
24 important subject in English, but when they came to
25 find that they had before them a man who was apparently

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deeply involved in a very grave offense, one punishable by fifteen years in prison and a fine of twenty-five thousand dollars; or if all they had on earth was the hashish, an offense punishable by five years in prison, they went ahead and dealt with him in English.

Now, I must find that Mr. Diop as a witness seemed to be full of self-esteem and self-assurance, very ready to lay it on others- I venture to guess that he lacked the discretion, the sense of healthy fear that should have warned him that the situation had suddenly gotten quite beyond him, but he ran his neck into the noose.

Is that the way the Miranda case works? I think not. I'm afraid that when it's a matter of the conscious waiver of the known constitutional right more must be present; man being unequal to a simple confession of his own inadequacy to deal with the situation as it suddenly got behind him.

Now, when I say that the Government was trapped, I mean exactly that, but I think that they were, and at that point one could only have hoped that some rare sixth sense could have warned them that they'd better get someone in there who could talk to him in a tongue that he could better understand, because the whole

1 plateau of comprehension required to the occasion had
2 suddenly changed, moved up a thousand feet from the
3 common commercial level.

4 I think Government counsel showed very
5 effectively, like businessmen, insurance men, he signed
6 a good many papers that he shouldn't have signed
7 without reading. I've heard people say you can't read
8 a lease before you sign it because if you did you
9 wouldn't sign it. You know, it's horror beyond all
10 horrors, you cover the text and sign it. It's a
11 contract of adhesion or a pistol to the head contract.
12 We all sign those things. We buy insurance policies
13 and say this time I am going to read them and by the
14 time you begin to read it you say well, I just hope my
15 agent warns me about these things; and I'm afraid much
16 of what Government counsel so easily brought out did
17 operate at that practical stage where you are signing
18 a sort of contract of adhesion, a necessary paper which
19 you sign for its effect, such for example, the forms
20 that Mr. Brady presented to him. Mr. Brady told him.
21 this is how you get released quick, getting the whole
22 thing put through the total clearance procedure;
23 shoved them in front of him, he signed them. I have
24 seen defendants in precinct station houses sign
25 insurance company indemnification agreements, similar

2 circumstances. If you stop to read them you'd be in
3 jail all night. The purpose of getting the hurry-up
4 bail is lost, just sign them and you are out and hope
5 that you haven't signed anything that would have you
6 deal with it more effectively at some later occasion.
7 What you are really interested in is how much is the
8 bond going to cost.

9 For these reasons, I would be compelled to
10 conclude the Government has not borne the burden of
11 establishing that the defendant consciously waived a
12 known constitutional right not to incriminate himself
13 by what he said to the officer.

14 Now, that would not apply, as I understand the
15 evidence, to the first part of what he said, to
16 Charles Grabattin, if I understood Mr. Grabattin's
17 somewhat wooden testimony correctly.

1 THE COURT: (Continuing) It is my understanding
2 that Mr. Grabattin in substance testified that at the
3 first meeting with Mr. Diop he said to him in substance
4 are you picking up this bit of cargo for yourself or
5 for someone else, and he said for myself; that this was
6 before Mr. Grabattin had looked into the carton or the
7 crate; and I assume, because I don't know what the
8 evidence is, that the United States did not through any
9 of its agents at that time know of or suspect the
10 presence of a controlled substance concealed in the
11 crate, because if it did, what I say at this point has
12 no application, because then this interrogatio.n would
13 force your argument to go out.

What I do say, if at this part of the
15 interrogation the Government was unsuspicous this may
16 be shown. Then he was asked, who are you, he was asked
17 to identify himself and produce a New York operator's
18 license, and that he then in response to questions of
19 Mr. Grabbatin, in which he pointed to different items
20 on one or another of the invoices, described the
21 merchandise or told Mr. Grabbatin what the different
22 items were, such as the one musical instrument; another
23 one was a name for a carving, and they were the names
24 of African musical instruments. Now, that part, before

2 Mr. Grabbatin poked into the crate and discovered the
3 material, I think is reasonable in evidence, because
4 at that point, everything was completely free of any
5 suspicion or wrongdoing and on the assumption of
6 defendant's innocence. He, too, would have been not
7 dealing with the situation with any constitutional
8 right except Custom duty -- and I think we could glean
9 from what Mr. Brady told us that apparently the
10 articles were duty-free, so that there was a proper
11 reason for asking for purposes of Customs clarification
12 what they were. I must say the Government presented
13 the issue on the Government's behalf as well as it
14 could be presented. I wish in a way that the issue was
15 one, if decided against the Government, the Government
16 felt was dispositive, so it felt could have taken an
17 appeal.

18 I'm very conscious that this point of subjective
19 and objective test may not have been sharply brought
20 out in any preceding case, and I would be a foolish
21 man if I were to say to you that I have total
22 confidence that my view of it has something, depending
23 on Defendant's subjective state of mind is critical
24 and dispositive, but it seems to me that that's the
25 nature of it, and in the absence of anything unreal

1 about it, it would normally be decisive; but I did
2 inquire earlier, and I can see through what is seen
3 of the evidence thus far, perfectly reasonable view
4 from Mr. Tietler that the Government would proceed with
5 the case whether or not the statements were receivable.
6 I should say by the way that I do take into account
7 what Mr. Tietler earlier emphasized; at a final point
8 the defendant and the evidence of one of the Government
9 witnesses did say he wanted a lawyer. On that one,
10 I am not sure that I would not accept Mr. Diop's
11 testimony, that at that point he made some reference to
12 wanting to get in touch with the embassy.

13 It seems to me, if I may say so more in character.

14 Now, I do think that some timing can be accorded
15 to the circumstance that nothing went to the point
16 where the Government people felt able to ask for or
17 got a written statement or an acknowledgment that the
18 warnings had been given. That doesn't seem to me to be
19 a potent circumstance here.

20 Did you want to reconsider that with Mr. Dawson?

21 We'll take a short recess.

22 (Whereupon, a recess was taken.)

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CERTIFICATE OF SERVICE

July 28, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Matthew Silbermann